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FILED

OCT 11 2006

October 11, 2006 SURFACE
TRANSPORTATION BOARD

By Hand Delivery



Vernon A. Williams, Esq.
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Finance Docket No. 34939
North America Freight Car Association – Petition for Declaratory Order

Dear Secretary Williams:

Please find enclosed for filing an original and ten copies of the captioned Petition, as well as a copy of the document on diskette. We also enclose our check in the amount of \$1,000 as the filing fee for a petition for a declaratory order involving a dispute over an existing rate or practice which is comparable to a rate proceeding.

Please call the undersigned with any questions you may have about this filing.

FEE RECEIVED
OCT 11 2006
SURFACE
TRANSPORTATION BOARD

Sincerely,

Andrew P. Goldstein

Andrew P. Goldstein
Attorney for
North America Freight Car Association

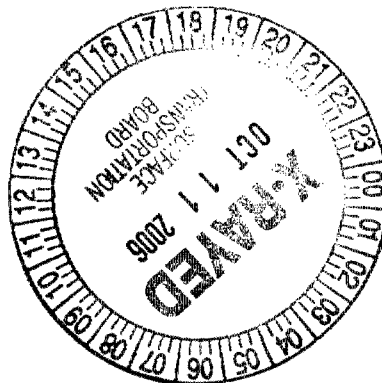
cc: Raymond Hasiak, Esq.
Union Pacific Railroad

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34939

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NORTH AMERICA FREIGHT CAR ASSOCIATION – PETITION
FOR DECLARATORY ORDER

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Attorney for Petitioners

Dated: October 11, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34939

NORTH AMERICA FREIGHT CAR ASSOCIATION – PETITION
FOR DECLARATORY ORDER

1. North America Freight Car Association ("NAFCA") is an unincorporated association comprised of entities that are manufacturers, lessors, lessees, and operators of privately-marked freight cars. NAFCA has been in existence for over 10 years for the purpose of protecting and furthering the interests of private cars operating in the U.S. railroad system. Privately-marked freight cars comprise approximately 54 percent of all freight cars operating in the U.S., and NAFCA members own and operate over 500,000 of the private cars, or about 70 percent of the private car fleet.

2. Union Pacific Railroad Company ("UP" or "Union Pacific") is a Class I railroad subject to the jurisdiction of the Board.

3. Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, NAFCA and certain of its members identified below (collectively "Petitioners") seek a declaratory order from the

Board to terminate the controversies and resolve the uncertainties described herein, which involve important questions of first impression arising from UP's discriminatory treatment of private cars, its failure to properly apply Board standards for private car registration, and its failure to apply industry Interchange Rules as intended, thereby unreasonably depriving private car operators of the right to register their cars for use and depriving private car suppliers of the ability to reasonably invest in freight car modifications. If the Board institutes a declaratory order proceeding as requested, petitioners will develop a record containing the following information.

4. Railroads are required by 49 U.S.C. 10742 to provide reasonable, proper, and equal facilities for the interchange of traffic and by 49 U.S.C. 11121 to provide reasonable rules and practices on car service. The Board has jurisdiction over railroad and rail industry interchange and car service practices by virtue of those provisions. The Association of American Railroads ("AAR") promulgates and supervises rules, known as the "Interchange Rules," governing the condition of and repairs to freight cars, both those owned by railroads and private interests. A carrier or private car operator becomes subject to the Interchange Rules by signing the AAR's Interchange Agreement. Petitioners believe that all railroads, including UP, are signatories to the Interchange Rules and other ancillary AAR mechanical and operating rules. The AAR will not permit a private car (other than a tank car) to operate on the railroad system unless the car owner or operator executes the Interchange Agreement, and private tank car owners or operators must subscribe to the AAR Mechanical Interchange Rules in order for those types of cars to operate.

5. For a great many years, the normal configuration for a covered hopper car used in the transportation of grain or grain products (among other commodities) enabled the car to handle gross weight on rail ("GWR") of up to only 263,000 pounds. In approximately the early 1990's, it was recognized that cars with larger carrying capacity would be more efficient to operate, and railroads began to publish rates applicable at 286,000 pounds GWR which reflected efficiencies of size and were more attractive economically than the lower-capacity rates. Consequently, car manufacturers sought to construct new cars capable of handling 286,000 pounds GWR, and car owners and railroads alike took steps to begin to convert many existing 263,000 pound GWR capacity cars to cars of 286,000 pounds GWR capacity.

6. In November 1994, AAR adopted what was known as Specification S-259, setting forth mechanical standards for upgrading freight cars from 263,000 pounds GWR to 286,000 pounds GWR. The S-259 mechanical specifications were applicable to all railroads participating in the interchange of freight cars, including Union Pacific. However, because not all railroad *tracks* were structurally capable of handling trains containing 286,000 GWR cars, the AAR circular announcing implementation of the S-259 weight upgrade standards stated that "acceptance of 286,000 lb. [GWR] cars in interchange is not mandatory -- *cars can only be operated under controlled interchange conditions, i.e., each railroad is to unilaterally register with AAR those particular track segments over which 286,000 lb. [GWR] cars will not be accepted.*" (Emphasis added.) In other words, it was the intent of the S-259 "optional acceptance" provision that cars upgraded in weight limit pursuant in AAR Standard S-259 could be denied acceptance in interchange if the cars were required to move over the receiving carrier's registered track

segments not physically capable of holding cars of that weight. Union Pacific has at no time asserted that the disputed actions it took were on account of track incapable of handling 286,000 GWR cars.¹

7. In 2003, The Andersons, a NAFCA member that is a lessor of freight cars, acquired a number of covered hopper cars that were mechanically configured to handle maximum loads of 263,000 pounds GWR. In reliance on AAR Standard S-259, The Anderson's invested in upgrades of the cars to handle 286,000 GWR loads. The AAR's S-259 upgrade specifications met by The Andersons permitted reliance on the cars' pre-existing truck castings and bolsters that were designed for 263,000 GWR if other changes to the cars were made, such as to the truck springs and braking system. At the conclusion of the S-259 upgrade process, The Andersons certified to AAR, as required by its rules, compliance with the S-259 standards, and the upgraded cars were then shown in AAR's Universal Machine Language Equipment Register ("UMLER") as having successfully undergone S-259 upgrades, qualifying them for 286,000 GWR loads.

8. In 2004, The Andersons leased 200 of the S-259 upgraded cars to Bunge North America, Inc., ("Bunge"), a NAFCA member that is a merchandiser of grain and a grain processor, and UP granted unrestricted OT-5 approval for Bunge to originate loads in those cars at 286,000 GWR at Bunge facilities served by UP.² In 2004, Bunge

¹ In 2002, AAR adopted mechanical specifications, called S-286, for newly built cars capable of handling loads of 286,000 GWR. Because those specifications apply prospectively, they contain certain truck casting certification requirements that were not included in the S-259 upgrade standards. Even after the new car S-286 standards were adopted, and AAR had announced a phase-out of S-259, it is Petitioners' understanding that, as recently as 2006, AAR expressly approved continued use of the S-259 standards for upgrades of thousands of older cars as an exception to its rules.

² OT-5 is a regulation of the AAR governing the registration of private cars, other than tank cars, for the origination of shipments on individual railroads. In the 1980's railroads improperly used their OT-5 procedures to bar private cars from being registered to initiate loads, thereby undermining the maintenance of an adequate fleet of covered hopper cars to handle dry bulk commodities. In 1989, the ICC found that it was an unreasonable practice and unreasonable car service for a railroad to deny OT-5 registration to a pri-

sought OT-5 approval from UP to utilize an additional 30 covered hopper cars leased by Bunge from The Andersons that likewise had been upgraded pursuant to AAR Standard S-259. Bunge sought OT-5 authority from several of its facilities on UP served by UP trackage capable of handling cars at 286,000 GWR. In August 2004, UP informed Bunge that UP would not honor the S-259 specifications for the new group of 30 cars and that OT-5 approval previously granted the 200 cars was being revoked for use of the cars at 286,000 GWR.

9. More specifically, Union Pacific advised Bunge on August 3, 2004 that UP has “experienced a number of failures directly related to truck bolsters, which were being utilized under loads for which they were not designed. Since 2001 there have been 13 broken side frame and bolster derailments costing [UP] \$4.4 million.” Claiming a “history of accidents” inferentially attributed to the AAR S-259 Standards, UP stated that it “will not accept the S-259 Standards as the sole basis for granting OT-5 authority ... at 286,000 GWR.” Union Pacific said, however, it would reconsider its position if either: (1) “satisfactory documentation that the truck castings are designed for 286,000 GWR loading” is provided to and approved by UP, or (2) “[a]n Indemnification Agreement [is executed in UP’s favor] that provides Union Pacific is to be held harmless from any and all costs associated with a failure of the above referenced equipment, together with a copy of an insurance policy binder naming Union Pacific Railroad as an additional insured providing minimum insurance in the amount of \$10 million for all costs, risks and

vate car for use in originating traffic, unless the denial was for “mechanical or safety” reasons or based on a lack of storage capacity for the cars. A railroad was, however, permitted to trump the actual loading of a registered private car if a railroad car was “available” for the contemplated movement, with the question of whether a railroad car was satisfactorily “available” to be determined on a case-by-case basis. See Shippers Committee OT-5 v. Ann Arbor Railway Co., et al., 5 I.C.C.2d 856 (1989), (“OT-5 Decision”) affirmed, Shippers Committee, OT-5 v. I.C.C., 968 F.2d 75 (D.C. Cir. 1992). None of UP’s challenged actions involve any UP assertion of inadequate storage capacity or the availability of UP cars to handle actual loads tendered for shipment.

damages associated with operating these cars on Union Pacific Railroad.” Otherwise, the S-259 upgraded cars leased by Bunge were allowed to originate only 263,000 GWR loads on UP.

10. Bunge considered UP’s second alternative – an indemnity and insurance agreement – to be totally inappropriate. The Andersons were unable to comply with the first of UP’s conditions requiring “satisfactory documentation” (even assuming for the sake of argument that imposition of the condition was reasonable or appropriate, which Petitioners believe not to be the case). Covered hopper cars built to carry 263,000 GWR are older cars and have often changed hands before residing with their current owner. The Andersons knew the approximate age of the 230 cars (they had all been built prior to 1994) but had no feasible way to obtain “satisfactory documentation that the truck castings [were] designed for 286,000 GWR loading.” In fact, AAR Standard S-259 allowed use of truck castings originally designed for 263,000 GWR, as noted previously.

11. In April 2006, following communications between UP and Petitioners, UP advised Petitioners that it would allow loading at 286,000 GWR on S-259 upgraded cars with pre-1995 bolsters if the bolster is “certified by an independent engineering firm that it is capable of carrying 286,000 GWR.” In response, The Andersons contacted an independent engineering firm, which stated that it would decline to provide such a certification unless it performed a metallurgical stress test on the bolster, and that such a stress test would cost approximately \$10,000 for each of the two bolsters on a car. Even if it were unnecessary to subject both bolsters on all pre-1995 cars to stress tests, stress tests would increase the cost of performing S-259 upgrades to a point where upgrading of the car would be uneconomical.

12. In a January 16, 2005 letter to Bunge, Dick Davidson, UP's Chairman, asserted that UP's position rests on "safety concerns." Nevertheless, UP has refused the requests of Bunge and NAFCA for documentation to support the UP claim that there have "been 13 broken side frame and bolster derailments" since 2001 and for UP to identify which such derailments, if any, were directly attributable to truck bolsters. Bunge informed Union Pacific in August 2004 that Bunge had been unable to substantiate UP's derailment claims through Federal Railroad Administration ("FRA") records, and UP was requested to provide information that would show how many of these alleged 13 "broken side frame and bolster derailments" were due to bolster, rather than side frame, failure and how many were due to bolsters manufactured in Mexico (the cars upgraded by The Andersons were built by a well known, reputable U.S. manufacturer).³ UP has refused to provide any such information or otherwise to substantiate its assertion that covered hopper cars with S-259 upgrades present valid "safety concerns."

13. Additional considerations undermine UP's effort to assert a valid "safety concern" argument under the *OT-5 Decision* or otherwise. Between 1994 and 2004, approximately 400,000 freight cars of all types, including some 150,000 covered hopper cars, were either upgraded from 263,000 GWR to 286,000 GWR pursuant to S-259 standards or were built new to carry 286,000 GWR pursuant to the S-259 standards. Those cars operate throughout the interchange system on all railroads, and play a valuable role in the movement of a wide variety of commodities. Other than UP, no railroad known to Petitioners – and certainly no other Class I railroad – rejects the AAR S-259 standard

³ Certain truck bolsters manufactured in Mexico by a specific manufacturer were noted by AAR in 2004 to be of suspect reliability, and AAR notified car owners to take remedial steps regarding cars with such bolsters, a program which is still ongoing. None of the subject S-259 cars have been identified by AAR as belonging to the suspect group. AAR has authority under the Interchange Rules to adopt an industry solution to a car mechanical problem.

when applied to cars in accordance with AAR mechanical specifications. Nor are Petitioners aware that any other railroad denies OT-5 authority for 286,000 GWR use on account of “safety concerns” when cars have been upgraded pursuant to S-259.

14. Petitioners asserted in their correspondence to Union Pacific that Union Pacific itself operated its own cars upgraded from 263,000 to 286,000 GWR pursuant to the S-259 standards; that thousands of cars with railroad marks having undergone such S-259 upgrades routinely are interchanged to UP loaded to 286,000 GWR from other carriers; and that even privately-marked cars that have been upgraded to 286,000 GWR pursuant to S-259 can operate over UP if they originate loads on other railroads, in all cases without proof regarding the design of the truck castings or an indemnity/insurance agreement. UP has not denied any of those assertions.⁴ Ironically, if the very upgraded private cars on which UP denied and revoked OT-5 authority for Bunge to originate 286,000 GWR loads on UP had been loaded to that weight on another railroad and shipped to a point on UP, UP would accept the cars in interchange and handle them without question. But UP then would refuse to let Bunge load the same cars at 286,000 GWR back to the same off-line point at which the cars had originated.⁵ Union Pacific's will-

⁴ Indeed, Petitioners believe that private and UP cars meeting the AAR S-259 specifications regularly load coal to 286,000 GWR on UP, if not other commodities.

⁵ As a shipper, Bunge has an ongoing controversy with UP not merely because of UP's discriminatory refusal to allow Bunge's cars to be loaded at 286,000 GWR while allowing identical railroad-owned cars unrestricted access to UP's lines, but also because the restrictions placed by UP on the loading of Bunge's cars increase Bunge's freight costs. Union Pacific's rates for the transportation of grain and grain products have differentiated between light-loading cars (those that carry 268,000 pounds GWR or less) and heavy-loading cars (e.g., cars that load to 286,000 GWR). Translated to loaded units, such as bushels or tons, the rates applicable to heavy-loading cars are lower than those applicable to light-loading cars. Additionally, as is obvious, if loading is restricted to 263,000 GWR per car, more cars are needed by Bunge to move the same volume of grain or grain products that could be moved in a lesser number of heavier-loading cars. This means higher net car rental or ownership costs for Bunge. It also adds to the number of cars on the UP system at a time when UP is asserting that its capacity is overwhelmed.

Effective October 1, 2006, UP changed certain of its pricing practices for covered hopper car shipments so that rates are based on cubic capacity, not weight. The Bunge cars on which UP denied or

ingness to accept in interchange from other carriers unlimited numbers of S-259 upgraded cars loaded to 286,000 GWR is inconsistent with UP's insistence that Petitioners' cars are "unsafe" for loading at 286,000 GWR on UP unless the cars meet UP's additional requirements described above.⁶ It is similarly inconsistent with a claim of "safety concern" for UP to state its willingness to permit use of Petitioners' cars for loading at 286,000 GWR so long as UP is indemnified for any damage or injury caused by those cars.

15. Under the *OT-5 Decision*, a carrier can deny OT-5 authority, and thereby preclude a private covered hopper car from originating loads on its line, for "safety" reasons. However, that prerogative implies a *valid* safety reason. There is clearly a controversy between Petitioners and Union Pacific over the question of whether there is a valid safety reason under the *OT-5 Decision* for the actions taken by UP. Union Pacific has refused to support its "safety" claims with documentation or proof to demonstrate that the asserted deficiencies in the S-259 standards, including an alleged failure of those standards to adequately address bolster issues, has lead to any widespread or discernable incidence of dangerous derailments. It has failed to justify the inconsistencies between how UP singles out only certain private cars under certain conditions for restrictive weight limits while accepting and handling carrier-owned cars at 286,000 GWR when built or upgraded to exactly the same S-259 mechanical specifications. And UP's will-

revoked OT-5 authority for 286,000 GWR loading are of a larger cubic capacity and take UP's high-cube rates. If Bunge chose to load these cars on UP at only 263,000 GWR, UP's tariffs nevertheless would place the cars in a higher rate category based on the cubic capacity of the cars, even though UP is refusing to allow that full capacity to be used.

⁶ As noted above, UP is willing to grant or reinstate OT-5 authority at 286,000 GWR for the cars leased to Bunge if UP is provided with "satisfactory documentation that the truck castings [were] designed for 286,000 GWR loading." The UP demand for such documentation mirrors a provision in the AAR's S-286 specifications adopted in 2002, requiring the "casting manufacturer to certify truck castings are designed to 286,000 GRL." UP is in effect attempting to apply retroactively the more recent S-286 certification provisions to use of upgraded S-259 cars, even though AAR itself did not include the certification requirement in the S-259 standards.

ingness to waive its alleged “safety” concerns if it is compensated through indemnity provisions is incongruous with a genuine claim of “safety” under the *OT-5 Decision* or otherwise. A declaratory order proceeding should be instituted to resolve those controversies and remove uncertainties regarding UP’s interpretation of the “safety” standard in the *OT-5 Decision*.

16. Another controversy arising from Union Pacific’s actions involves the degree of reliance that can be placed by private car suppliers and operators on mechanical specifications adopted by the AAR for industry-wide application, such as the S-259 standard. Specification S-259 was relied upon, like other AAR industry-wide specifications, as the basis for freight car investment and supply, in this instance in the form of car upgrading. To justify the investments necessary to maintain an adequate supply of freight cars, especially the types of cars that railroads appear unwilling to supply,⁷ it is essential that there be uniform, industry-wide mechanical standards and specifications, such as S-259, precisely so that freight cars can circulate in interchange among all railroads consistent with track weight conditions.

17. A refusal by one railroad, such as UP, to recognize and accept AAR specifications such as S-259, particularly after they have been in effect for years following approval as provided through AAR procedures, discourages necessary freight car investment by subjecting suppliers of private freight cars to uncertainty and unwarranted financial risk when they make AAR-approved upgrades. If each railroad is free to “balkanize” industry-wide mechanical standards, investment in freight car rehabilitation, if not in the construction of new cars as well, will be stifled and barriers to the use of cars meeting

⁷ For example, the national covered hopper car fleet today is 65 percent privately owned, 6 percent owned by Class II and Class III railroads, and only 29 percent owned by Class I railroads such as UP, according to the 2005 edition of Railroad Facts published by AAR.

recognized industry standards will prevail, allowing each railroad to impose its own mechanical standards.

18. The Board should issue a declaratory order to remove the uncertainty created by UP's actions regarding the applicability to all railroads of AAR mechanical standards for use and interchange of cars. Union Pacific's demands that Petitioners satisfy UP requirements for use of upgraded S-259 cars at 286,000 GWR are inconsistent with AAR rules, on which Petitioners have a right to rely, and additionally are unduly burdensome or unreasonable. The covered hopper cars for which UP denied or revoked OT-5 authority for loading at 286,000 GWR met AAR mechanical specifications for that type of use at 286,000 GWR. Although Rule 70 of the AAR Interchange Rules states, under "Remarks," that "acceptance ... in interchange is not mandatory" for S-259 upgraded cars operating with 286,000 GWR, that proviso is inapplicable to Union Pacific's actions. First, it is crystal clear from the S-259 Circular Letter identified previously that the "non-acceptance" remarks in Rule 70 were aimed strictly at protection against the movement of 286,000 GWR cars over bridges and track segments that are structurally unsafe for such loads. There is physically insufficient space in the Rule 70 "Remarks" section for the entirety of the Circular Letter "non-acceptance" sentence, and Rule 70 simply resorted to shorthand. Union Pacific has not aimed its exclusionary S-259 conditions at low-weight track.⁸

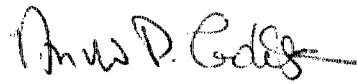
⁸ In recent years, improvements in carrier information technology have enabled carriers to identify and deal with on a car-specific basis any conflicts between the use of heavy-load cars and tracks or bridges not suitable for such cars, so that it is no longer necessary for a "not mandated for interchange" condition to be attached to heavy cars across the board, as in S-259. Union Pacific, for example, announces on its website that it "recently made improvements to its computer system that will identify" shipments at 286,000 GWR as soon as the cars enter the UP system. UP's web states that if "a car exceeds the gross weight limit for the requested route, it will automatically be placed in hold."

19. In any event, even if the "non-acceptance" remarks of Rule 70 are applied literally, they do not justify or excuse UP's actions. Union Pacific is not refusing to "accept" S-259 upgraded cars "in interchange." In fact, UP *regularly accepts* S-259 upgraded cars in interchange from other carriers when loaded to 286,000 GWR, and UP has at no time denied doing so. Instead, UP is refusing to allow Bunge's *private cars to originate 286,000 GWR loads*. AAR Rule 70 does not authorize UP to refuse to *originate* cars. Nor does it authorize a separate standard for private cars. Union Pacific's actions are not protected by either the letter or the spirit of the Interchange Rules (over which the Board in any event has oversight jurisdiction should such Rules contravene a provision of the ICCTA). A declaratory order proceeding should be instituted by the Board, in furtherance of its jurisdiction over both interchange and car service, to terminate the disclosed controversy regarding UP's failure to observe AAR Rules.

A declaratory order proceeding also should be instituted to resolve the related questions of whether it is an unreasonable practice in violation of 49 U.S.C. 10702, or an unreasonable car service practice in violation of 49 U.S.C. 11121, or a failure to provide reasonable, proper, and equal facilities for the interchange of traffic within the meaning of 49 U.S.C. 10742, for an individual railroad to limit the ability of a private car owner to use its cars in interchange service when the car is in compliance with AAR mechanical

specifications and the carrier allows identical cars of carrier ownership to operate without the same restrictions it imposes on the private cars.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew P. Goldstein", with a stylized flourish at the end.

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